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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Colorado Case Nos. 94SA48 and 94SA128

BRIEF OF EQUAL RIGHTS, NOT SPECIAL RIGHTS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF EQUAL RIGHTS, NOT SPECIAL RIGHTS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Equal Rights, Not Special Rights, Inc., a Cincinnati, Ohio-based non-profit educational organization devoted to pro-family issues, has a very strong and direct interest in the outcome of this case. In 1992, the Cincinnati City Council enacted a "Human Rights Ordinance" that prohibited discrimination in employment, housing, and public accommodation on the basis of sexual orientation. In response, *amicus'* predecessor organization, Take Back Cincinnati, organized a petition drive to place on the ballot a proposed amendment to the City Charter that would both repeal the sexual orientation provisions of the Human Rights Ordinance and prohibit City Council from enacting similar legislation in the future. That charter amendment, called Issue 3, was approved on November 2, 1993, by a vote of 62% to 38%.

On November 8, 1993, several individuals and organizations sued in federal court seeking to enjoin the implementation of Issue 3. *Amicus* was then formed for the purpose of defending the constitutionality of Issue 3, and it participated fully in the case as an intervening defendant. The district court, relying explicitly upon the Colorado Supreme Court's opinions in this case, entered first a preliminary, and then a permanent injunction against Issue 3. *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993), *injunction made permanent*, 860 F. Supp. 417 (S.D. Ohio 1994). *Amicus* appealed the district court's ruling on Issue 3, and oral argument was heard by a three-judge panel of the United States Court of Appeals for the Sixth Circuit on March 7, 1995. While there are some differences between the Issue 3 lawsuit and the case now before this Court, the "fundamental rights" aspect of both constitutional challenges is quite similar.

Because of the importance of this case to *amicus*, it submits this brief to assist the Court in its resolution of this case.[1]

STATEMENT OF THE CASE

On November 3, 1992, Amendment 2, a proposed amendment to the Colorado Constitution sponsored by Colorado for Family Values, was passed in a statewide general election by a vote of 53.4% to 46.6%. In *Evans I*, the Colorado Supreme Court affirmed a trial court's preliminary injunction against Amendment 2, holding that:

> [T]he Equal Protection Clause . . . protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny.

Pet. App. D-21. The Court purported to discover this "fundamental right" after discussing four groups of this Court's equal protection cases – namely, those involving "preconditions on the exercise of the franchise," "reapportionment," "candidate eligibility," and "cases involv[ing] legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters." Pet. App. D-9-14. After conceding that the first three sets of these cases "addressed entirely distinct questions and constitutional problems from those presented here," Pet. App. D-13, the Court nonetheless concluded that they are all driven by a common principle, the "fundamental right

[1] Letters from both parties consenting to the filing of this brief have been filed with the Clerk of the Court.

to participate equally in the political process." Pet. App. D-14.

The linchpin of the Colorado Supreme Court's holding, however, is its interpretation of the fourth category of equal protection cases, beginning with *Hunter v. Erickson*, 393 U.S. 385 (1969), and including cases discussing the so-called *Hunter* doctrine. The Court, relying primarily upon this Court's holding in *Gordon v. Lance*, 403 U.S. 1 (1971), held that the rule of *Hunter* is not limited to the racial context in which it was announced, but rather stands for the proposition that the Equal Protection Clause is violated by any law that makes it more difficult for "any identifiable group" to enact legislation in that group's behalf. The Court therefore held that Amendment 2 must be subjected to strict scrutiny.

Subsequently, in *Evans II*, the Colorado Supreme Court reaffirmed its earlier holding in *Evans I*, Pet. App. B-7,[2] and then affirmed the district court's conclusion that the state had failed to meet its burden of showing that Amendment 2 is narrowly tailored to advance a compelling governmental interest. Pet. App. B-24. Accordingly, the Court affirmed the permanent injunction barring the enforcement of Amendment 2. This Court granted the State of Colorado's petition for a writ of certiorari on February 21, 1995.[3]

[2] In support of its decision to reaffirm *Evans I*, the Court noted that the federal district court in *Equality Foundation v. City of Cincinnati* had adopted the same legal theory – *i.e.*, that the Equal Protection Clause prohibits laws that infringe the so-called fundamental right to participate equally in the political process by making it more difficult for an independently identifiable group to enact legislation in its behalf – in the course of striking down Issue 3. *See* Pet. App. B-7 n.4.

[3] Beyond these facts, *amicus* adopts the Statement of the Case set forth in the opening Brief of Petitioners.

SUMMARY OF ARGUMENT

In response to a seemingly unexceptionable exercise by the Colorado voters of their right to self-governance, the Colorado Supreme Court went to truly astonishing lengths to concoct a brand new "fundamental right" that would, if affirmed, effectively eviscerate the people's right "to alter . . . their constitution and form of government whenever they may deem it necessary to their safety and happiness . . . . " Colo. Const. art. II, § 2; *see also id.*, art. V, § 1 (procedures for amending the state constitution through the initiative process). In a democratic society, courts are properly reluctant to invalidate such manifestations of popular sovereignty unless they are irreconcilable with a specific command of the United States Constitution. Here, however, the simple and regrettable fact is that this state supreme court has invalidated the votes of its citizens with no lawful warrant whatsoever.

1. Amendment 2 represents a perfectly rational determination by the voters of Colorado that government at all levels in that state should remain neutral on the contentious moral and political issue of whether citizens can, in their private associations and pursuits, take homosexuality into account. It was enacted in response to laws adopted by various political subdivisions of the state, as well as by certain statewide agencies, that prohibited state residents from acting on their sincerely held moral and religious beliefs that homosexuality – unlike, for example, race, ethnicity, or gender – is a morally relevant characteristic. By repealing those laws and preventing similar laws from being enacted in the future, Amendment 2 respects the right of all Colorado residents to accord to homosexuality such significance as they believe it warrants.

And that is all Amendment 2 does. It manifestly does not affect the right of any citizen to vote, to run for office, to lobby or to engage in political speech, to seek to amend the state constitution, or otherwise infringe the right of citizens to participate equally in the political process. To be sure, Amendment 2 does deny elected representatives of the state and its subdivisions the authority to adopt laws that would accord minority or preferential status to homosexuals. But that fact does not amount to a political disability or obstacle; it is, rather, the result of the fact that people have decided to enshrine this important policy decision in the state constitution.

Depriving elected officials of the authority to enact certain laws cannot be a denial of any right to lobby those officials or otherwise to participate in the political process. If the right to political participation did encompass a right to have local governments retain authority to make decisions favored by certain groups in the face of a contrary directive from the electorate, this would mean that state constitutions or state governments could never resolve contentious policy issues because all such decisions necessarily circumscribe the authority of lower-ranking government officials. As every high school civics student learns, the Constitution does not *limit* the people's ability to prevent unwarranted governmental intrusions – it is, instead, the ultimate manifestation of popular sovereignty. Simply stated, in a system founded on the notion that the people are the source of all governmental authority, with the power to grant and delimit the authority of their various elected representatives, it stands the system on its head to say that the Constitution requires that local representatives retain the right to override limits imposed by their constituents.

2. The Colorado Supreme Court's attempt to limit the "fundamental right" so that only "independently identifiable groups" can invoke it is totally unavailing. Once *Hunter* and its progeny are divorced from the

unique, race-specific context in which those cases arose, there is simply no principled ground for distinguishing between groups that can rely on this supposed "fundamental right" to invalidate elections and those that cannot. Indeed, every election on a popular referendum or initiative yields a "disadvantaged" group that can be characterized as "independently identifiable" – namely, the voters who lost. And because there is no basis for distinguishing between "independently identifiable groups" and the outvoted, any attempt to limit the availability of this license to overturn election results will necessarily place federal and state judges in the unacceptable position of deciding which elections they believe ought to be invalidated.

3. Finally, *amicus* will confirm what these preliminary observations necessarily suggest – that the "fundamental rights" theory adopted by the Colorado Supreme Court is not supported, much less compelled, by this Court's equal protection jurisprudence. The *Hunter* doctrine applies only in cases involving laws that impose unique political obstacles on racial minorities, a fact made clear beyond any doubt by this Court's subsequent decision in *James v. Valtierra*, 402 U.S. 137 (1971), where the Court expressly refused to extend *Hunter* to laws allegedly disadvantaging identifiable but nonracial groups. Moreover, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), is, like *Hunter*, a case about racial classifications, and it expressly did not otherwise recognize a "vested constitutional right to local decisionmaking." *Id.* at 498-99. Thus, because Amendment 2 neither burdens a suspect class nor infringes upon any fundamental right, it is constitutional if it is rationally related to a legitimate government objective, a test even the court below conceded Amendment 2 meets.

ARGUMENT

I. Amendment 2 Is A Permissible Exercise Of Popular Sovereignty And Does Not Infringe On Any Fundamental Rights.

By enacting Amendment 2, a majority of Colorado's voters determined that, on balance, it was best to restore government to a position of neutrality on the divisive political and moral issue of whether private actors may take account of homosexuality in their private associations and pursuits. The court below did not and could not suggest that this decision violated any substantive command of the Constitution. Plainly, the Constitution does not require inclusion of homosexuals in civil rights laws regulating private conduct, and so that decision is left to states or local communities to work out for themselves.

The Colorado Supreme Court nonetheless determined that, although Amendment 2 embodied a perfectly constitutional substantive decision, it unconstitutionally interfered with homosexuals' right to participate in the political and lobbying process. Pet. App. D-26. Yet Amendment 2 does not refer to the political or voting or lawmaking processes, and it certainly does not limit homosexuals' ability to participate in those processes. Amendment 2 in no way impedes homosexuals' access to the ballot, or to state or local legislators, or to the electorate; it does not diminish the weight of their vote, or otherwise impose the types of differential rules for political participation that have been the *exclusive* concern of this Court's political participation cases.

To be sure, after Amendment 2, neither local governments nor the Colorado state legislature can pass laws granting special protected status to homosexuals, and it would therefore be futile for homosexuals – or heterosexuals – to lobby them to do so. Prior to Amendment 2, however, supporters of homosexual marriage could not successfully lobby their local city council to sanction such

marriages, because they had been proscribed by the Colorado state legislature. Likewise, citizens could not successfully lobby the state legislature to admit gays into the U.S. military, because the U.S. Constitution lodges that decision with the federal government. But the inability to achieve desired political results from any particular governmental entity does not constitute a denial of a fundamental political right to lobby a local or state legislature, or otherwise to participate politically. Rather, it simply reflects the fact that a superior lawmaking entity has definitively resolved a public policy issue contrary to respondents' desires, thus rendering their lobbying of an inferior lawmaking entity superfluous.

In this case, the only difference is that the superior lawmaking entity is not the state or federal legislature, but the people of Colorado, who adopted Amendment 2 through the constitutional amendment process. It is undoubtedly permissible for the Colorado state legislature to bind political subdivisions,[4] and for the federal government to bind the Colorado legislature, on issues affecting "independently identifiable groups." It is therefore also permissible for the people of Colorado to control their representatives' legislative efforts, unless the federal

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[4] The Colorado Supreme Court did not suggest that it would be impermissible for the Colorado state *legislature* to bar political subdivisions from granting homosexuals protected status. The perceived constitutional deficiency was apparently not that the state had foreclosed lobbying of local governments, but that Amendment 2 foreclosed successful lobbying of "state *and* local government." Pet. App. D-27 (emphasis added); *see also* Pet. App. D-25 ("state and local control"). To the extent the court below was suggesting that state legislatures cannot control their political subdivisions or that certain public issues must be resolved at the local level, this contention is utterly without merit for the reasons discussed below. *See infra* at 12-13.

Constitution imposes some special prohibition on such exercises of popular sovereignty.

The Colorado Supreme Court created such a special prohibition by inventing a "fundamental right" for representatives to exercise ultimate control over the electorate. According to the court below, state and local legislatures must retain absolute veto authority over popularly-enacted amendments so as not to "disenfranchise" "independently identifiable groups" who seek to lobby those legislatures. Under that reasoning, unless the Aspen City Council and Colorado state legislature retain the right to make decisions favored by such groups, those groups cannot successfully lobby the City Council or legislature for the results they desire, and are thus denied their fundamental political rights. The constitutional problem, then, is not that homosexuals have been denied any *access* to state or local government, but that those governments have no authority to override the state constitution and give respondents what they want. Consequently, to avoid such a "deprivation," state constitutions cannot decide important public policy issues that adversely affect the political desires of an "identifiable group."

There is, however, nothing in the federal Constitution that prohibits the people from resolving important public policy issues for themselves or that requires them to delegate such important decisions to their employee representatives. The basic point is this: with respect to any controversial public issue, *somebody* must have the final say – either the people or their representatives. The necessary result of empowering one entity with such final authority is to render the potentially contrary decisions of the subordinate body ineffective, and thus to make lobbying of that body superfluous.

Contrary to what the court below concluded, the Constitution does not require elected representatives to

have final binding authority over their electors. The federal Constitution, like the Colorado Constitution, is premised on the basic principle that the people are the source of all legitimate authority, and that, as part of the social contract, the people retain the power to dictate the proper scope of governmental authority. This basic truth was noted by the Supreme Court as early as *Marbury v. Madison*: "[T]he people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness . . . . " 5 U.S. (1 Cranch) 137, 176 (1803).[5]

Since *Marbury*, the Court has recognized this fundamental principle and praised popular initiatives as a salutary means of effectuating democratic self-governance:

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[5] *Marbury* simply distilled the central theme of our nation's founding. *See, e.g.*, The Declaration of Independence para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. . . . "); *The Federalist* No. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; . . . "); Speech of James Wilson, Pennsylvania Ratifying Convention (Dec. 4, 1787), *reprinted in* 1 *The Founders' Constitution* at 62 (Philip B. Kurland and Ralph Lerner eds., 1987) ("[My position] is, that [the supreme power] *resides* in the PEOPLE, as the fountain of government; that the people have not – that the people mean not – and that the people ought not, to part with it to any government whatsoever. In their hands it remains secure. They can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper."); U.S. Const. amends. IX and X.

"The referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.' " *City Eastlake v. Forest City Enters.*, 426 U.S. 668, 673 (1976) (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)); *see also James*, 402 U.S. at 141 ("Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). By approving Amendment 2, the voters of Colorado did nothing more than make such a "final decision, amounting to a veto," over prior decisions by local city councils to grant special protected status to homosexuals. Exercising such final authority cannot possibly run afoul of a Constitution "ordain[ed] and establish[ed]" by "We, the People." U.S. Const. pmbl.

The people of the various states are thus entirely free to use their constitutions to prevent local or state legislatures from passing laws that the people find unwarranted or inappropriate. This, indeed, is what constitutions do. The federal Constitution, and in particular the Bill of Rights, is nothing more than a series of directives from the sovereign people to their employee representatives regarding the type of laws the representatives may enact. According to the court below's logic, the First Amendment's directive to "Congress" that it "shall make no law respecting an establishment of religion" grossly violates the political participation rights of those who desire or benefit from religious establishments. Such religious observers are "singled out" and "disenfranchised" by the First Amendment because, unlike other groups, they cannot *successfully* lobby Congress for legislation that is important to them and benefits them – that is, laws funding or otherwise establishing religious organizations.

Amendment 2 places precisely the same type of limitation on Colorado's elected legislators as the First

Amendment imposes on Congress, and so it plainly cannot interfere with any political rights guaranteed by the First or Fourteenth Amendments. Rather, just as the First Amendment permissibly constrains federal representatives from passing laws that interfere with the people's freedom to act on their religious beliefs, so too does Amendment 2 permissibly direct Colorado representatives not to pass laws that interfere with the people's freedom to act on their religious or other beliefs concerning homosexual behaviors and lifestyle.

Alternatively, to the extent the Colorado Supreme Court was suggesting that the constitutional deficiency in Amendment 2 was that it resolved the question of whether homosexuals should enjoy protected status at the state – rather than at the local – level, this suggestion is equally devoid of merit. The fact that a state legislature or constitution resolves a particular policy question in a manner that forecloses inconsistent action by its political subdivisions does not in any way deny a right to lobby or participate politically. There is no "fundamental right" to petition local city councils to enact laws inconsistent with the state constitution, just as there is no "vested constitutional right to local decision-making" of important questions. *Washington*, 458 U.S. at 480 n.23. To the contrary, the state is entirely free to constrain the discretion of its political subdivisions, to order its internal government processes in any way it deems fit, and to resolve public policy issues at whatever level of government it desires. States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978). In the words of Mr. Justice Cardozo, a political subdivision, "created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in

opposition to the will of its creator." *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933).[6]

Thus, just as the people may control their representatives' legislative efforts, so too may a state permissibly control the scope of the lawmaking authority of its political subdivisions. Accordingly, no one has a "right" to empower the local government to decide "gay rights" issues or any other issues. To the extent the court below determined that local governments must have such authority – to ensure that lobbying of those governments is "meaningful" – it is plainly wrong.

Were the rule otherwise, all laws restricting homosexual marriage, child custody and adoption would be unconstitutional because the various states have decided all such issues at the state level. Thus, respondents would have no more success lobbying the Aspen City Council to authorize homosexual marriages than it would having the Council grant special protected status to their group. If respondents' fundamental rights were truly deprived simply because the city council had no authority to deal with a particular issue, then their right to lobby on, for

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[6] *See also Washington*, 458 U.S. at 476 ("[S]chool boards, as creatures of the State, obviously must give effect to policies announced by the state legislature."); *Newark v. New Jersey*, 262 U.S. 192, 196 (1923) ("The City cannot invoke the protection of the Fourteenth Amendment against the State"); *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) ("The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. . . . The State, therefore, at its pleasure may modify or withdraw all such powers . . . "); *Barnes v. District of Columbia*, 91 U.S. 540, 544-45 (1876) ("A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State, exercising and holding powers and privileges subject to the sovereign will.").

example, homosexual marriage has also been infringed by state law. A similar "deprivation," of course, has also been visited upon all the other groups who have an interest in the literally thousands of issues that local governments cannot resolve because they have been addressed by superseding state or federal law. There is, in short, no constitutional flaw in such preemptive state and federal laws.

II. The Colorado Supreme Court's Decision Would Either Invalidate All Popular Referenda Or Mandate A Discriminatory Political And Legislative Process.

The Colorado Supreme Court's revolutionary assault on self-government cannot logically be limited to the gay rights context. That being so, acceptance of its "fundamental rights" theory would either invalidate all popular referenda (and perhaps all state laws) or mandate an incoherent, discriminatory political regime that virtually insures success to judicially-favored special interests. We will examine each point in turn.

If Amendment 2 violates the so-called "fundamental right to participate equally in the political process," then the same is true of virtually all popularly-enacted constitutional amendments or referenda. *Every* time the citizenry enacts a statewide provision by direct popular vote, the necessary and intended effect is to take the matter being voted upon out of the hands of state and local elected representatives and place it directly in the hands of their principals, the people who elected them. And in every such case the losing side will suffer precisely the same alleged deprivation of political rights respondents claim here – an inability to lobby local governments or the state legislature to reverse the results of the amendment. Moreover, if the court below's rule applies to state legislation, then all such legislation is

unconstitutional because it inevitably circumscribes the authority of its political subdivisions and thus renders lobbying of those lower-ranking bodies futile.

The Colorado Supreme Court sought to avoid these absurd consequences by suggesting that the benefits of its new-found political right are limited only to those who are members of an "independently identifiable class of persons." Pet. App. D-21. This "limitation," however, is both illusory and irrational. First, it is not truly a limitation because virtually every group affected by a constitutional amendment or legislation will be "independently identifiable" – that is, defined by reference to some occupation, characteristic, or behavior distinct from how they voted on the particular measure. Gun owners, smokers, drug addicts, civil servants, incumbent politicians, ex-felons, farmers, insurance companies and virtually every other interest group share a common occupation or lifestyle choice that makes them "identifiable" wholly apart from their position on a particular referendum or legislation. Thus, any constitutional amendment or state law to limit gun ownership, civil rights protections for drug addicts, public smoking, parole rights, civil service salaries or terms of office will necessarily be invalidated because each such measure "singles out and prohibits [a] class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process." Pet. App. D-26. Indeed, with the possible exception of an across-the-board tax increase, it is difficult to conceive of any public policy issue that does not particularly affect an "independently identifiable group."

Moreover, the limitation the court below seeks to engraft on its own fundamental political rights theory is inconsistent with the very notion of a fundamental constitutional right. It is axiomatic that fundamental rights

apply to *all* individuals,[7] and that is no less true with regard to rights of political participation. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax because it infringed on fundamental right to vote). So if there truly were a constitutionally guaranteed right to lobby local and state government to overturn constitutional amendments, this right would necessarily inhere in *all* individuals and groups. There is no basis in logic or law for granting this fundamental right only to certain so-called "independently identifiable groups."

Yet the Colorado Supreme Court seemed to say that those citizens who unite in a group for the express purpose of lobbying or voting on public matters – for example, those opposed to tax increases or industrial pollution – will be denied the "fundamental right" the Court extends to other groups that can be identified by something other than a shared political agenda. Pet. App. D-23. Understandably, the court below never attempted to explain *why* this supposed "fundamental right to participate equally in the political process" should be granted to groups whose defining characteristics are unrelated to politics, yet denied to groups whose *raison d'être* is precisely such political participation.

The lower court's "independently identifiable group" limiting principle is, then, neither limiting nor principled.

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[7] *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969) (recognizing fundamental right to travel); *Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("It is enough to say that the classification involved in *Shapiro* was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement."); *see generally* Laurence H. Tribe, *American Constitutional Law* at 1454 (2d ed. 1988) (all fundamental rights merit strict scrutiny).

Equally important, acceptance of this "identifiable" group concept would *require* suppression of constitutionally protected political activity and mandate that the federal judiciary arbitrarily choose winners and losers in virtually every policy battle. Under the regime of political favoritism adopted by the Colorado Supreme Court, "independently identifiable groups" will have a constitutionally-guaranteed right to overturn every state constitutional amendment (and perhaps every state law) that is adverse to their agenda, while groups that do not attain this exalted constitutional status will be deprived of that right. This "political rights" theory creates a situation where "independently identifiable groups" will either prevail at the ballot box or in court with respect to any amendment that adversely affects their interests, while unidentifiable groups will see any electoral victory over an identifiable group overturned in court.

For example, because Colorado for Family Values and similar organizations are presumably not among the favored groups, they presumably could not overturn a state constitutional amendment or a state statute *banning* private refusals to associate with homosexuals, although such a law would run directly contrary to their political, moral and religious interests.[8] Similarly, constitutional

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[8] This is not merely a hypothetical scenario. In response to the enactment by the people of numerous Oregon cities and counties of laws prohibiting those governments from according protected class status to homosexuals, the Oregon state legislature passed a law that preempted those local laws. *See* Or. Rev. Stat. § 659.165 (1994). Whereas Amendment 2 prohibits local governments from granting protected status to homosexuals, the Oregon law prohibits local governments from adopting measures that prohibit the granting of such status. That law, which was recently upheld by the Oregon Court of Appeals, *see de Parrie v. State of Oregon*, Nos. A83441, A83455, 1995 Or. App. LEXIS 570 (Or. App. Apr. 12, 1995), would, under *Evans I*,

amendments prohibiting state funding of private abortions or sectarian churches could never be enacted because they adversely affect the interests of "independently identifiable groups" (assuming poor pregnant women and religious groups satisfy this extraordinarily nebulous standard). By contrast, amendments *favoring* public financing of abortions or religious organizations would be constitutionally permissible because taxpayers and those with qualms about subsidizing abortions or religious practices are presumably not "independently identifiable."

Thus, under the court below's "fundamental rights" regime, the judiciary will directly dictate to the people of a state how they may resolve policy choices that the Constitution expressly leaves to their discretion. The people (and perhaps representatives) of the state are forbidden from making policy choices disfavored by any "independently identifiable group" (no matter how powerful or wealthy that group) since all such statewide decisions prohibit that group from seeking a contrary decision from local governments. Such a prohibition would infringe the "fundamental political rights" of those groups, such as Colorado for Family Values, that disagree with "independently identifiable groups," such as respondents. Indeed, the only restriction on political rights entailed here is caused by the injunction against Amendment 2, because it deprives Colorado for Family Values of the right to lobby their fellow citizens for legislation which they believe is necessary to prevent an unwarranted intrusion on their freedom to associate. Thus, the Colorado Supreme Court truly did "single out" and "disenfranchise" a group of Colorado citizens by

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plainly amount to a violation of the fundamental right of the supporters of those preempted local laws to participate equally in the political process.

denying that group access to a lawmaking procedure available to all other citizens – the constitutional amendment route.[9]

In light of these unacceptable implications of the Colorado Supreme Court's ruling, it is plain that the only permissible course is for the judiciary to remain neutral with respect to any democratically-enacted policy choice about which the Constitution itself is neutral. If the Constitution does not prevent a state from making a certain policy choice, it does not prevent the people (or legislatures) of that state from making that policy choice. Under the Constitution, the state need not establish a discriminatory, dual political system where certain special interests (*i.e.*, so-called "independently identifiable groups," such as homosexuals) may achieve their political goals through constitutional amendments (or state legislative action), but adverse, "unidentifiable" interest groups are denied all statewide avenues for achieving political success.

The same political process is available to the respondents as is available to all people who have lost a substantive electoral or legislative battle: they may seek to overturn the results by returning to the body which made the adverse decision (in this case, the Colorado electorate), or to a higher body (*e.g.*, the U.S. Congress). That is how Amendment 2 was enacted, and that is how it can be repealed. Yet, respondents nevertheless maintain that

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[9] If the Colorado legislature had banned from the ballot certain proposed constitutional amendments solely because of their content or viewpoint – that is, because they expressed a viewpoint that was contrary to the interests of independently identifiable groups – this law might well run afoul of the First and Fourteenth Amendments' guarantees of equal political participation. The Colorado judiciary therefore cannot enshrine such a viewpoint-based discriminatory denial of access in the name of the political rights protected by those Amendments.

their right to political participation has somehow been infringed because they do not have available to them a special, third option for overturning Amendment 2's substantive decision – namely, the "right" to have *lower*-ranking bodies like the local city councils or the Colorado legislature overturn decisions made by the people. But the Constitution does not guarantee any group in Colorado or the nation the right to have elected representatives overturn the decisions of those who elected them. And the lower court's insistence on granting respondents this special, third option is plainly preferential treatment that has nothing to do with even abstract principles of political *neutrality*, much less with any value that can be gleaned from the text, history or philosophical underpinnings of the Constitution. Accordingly, while the judiciary must invalidate all laws that prescribe unconstitutional policies – whether passed by the electorate or their representatives – it has no warrant to strike down laws prescribing perfectly constitutional policies simply *because* they are enacted directly by the people.

III. The Court Below's Decision Cannot Be Reconciled With This Court's Binding Precedent.

In addition to offending every basic notion of self-government and constitutional governance, the decision below is also contrary to the binding precedent of this Court. The Court has made it abundantly clear that popular referenda may definitively resolve issues adversely affecting identifiable groups, even though those referenda unequivocally foreclose identifiable groups from lobbying or petitioning the relevant legislative body to grant the benefits denied by the referendum. This Court's cases establish that popular referenda are unconstitutional only if the decision embodied in the referendum violates a substantive command of the Constitution.

There is no constitutional offense if the popular referendum makes a legitimate decision, even though this decision disables elected representatives from undoing that decision.

Specifically, under *Hunter v. Erickson*, 393 U.S. 385 (1969), and its progeny, the Court will invalidate a popular referendum only when the mandate of the referendum is "suspect" because it contains (1) a racial classification which (2) imposes special obstacles on racial minorities in the political process. In other words, *Hunter* and its progeny are simply racial classification cases, not "fundamental rights" cases. While this Court has embraced the obvious principle that popular referenda are prohibited when they embody an unconstitutional decision such as a racial classification, it has never hinted that referenda embodying constitutional decisions are invalid because they interfere with some "fundamental right" to overturn that decision. Because Amendment 2 neither embodies a racial classification nor erects any special rules disadvantaging homosexuals relative to others who lose an election, *Hunter* and subsequent cases supply no basis for overturning that Amendment. The briefest review of applicable precedent makes this clear beyond peradventure.

In *James v. Valtierra*, 402 U.S. 137 (1971), this Court upheld a constitutional amendment requiring popular referendum approval of all public housing projects previously authorized by the local city council. Two years earlier, in *Hunter*, this Court unanimously struck down a charter amendment requiring popular referendum approval of all racial fair housing laws previously authorized by the local city council. As the dissent in *James* emphasized, the only difference between these two cases was that the *Hunter* amendment imposed additional political burdens on a racial minority, while the *James* amendment imposed additional political burdens on a

nonracial, "independently identifiable group" – poor beneficiaries of public housing. The Court in *James* stated, in the plainest possible English, that this difference was constitutionally dispositive: "Unlike the Akron referendum provision [in *Hunter*], it cannot be said that California's Article XXXIV rests on *distinctions based on race*. . . . The present case could be affirmed *only by extending Hunter, and this we decline to do.*" *Id.* at 141 (emphasis added) (citations and internal quotations omitted).

If there were anything to the "fundamental right" invented by the Colorado Supreme Court, the challenged provision in *James* plainly would have been unconstitutional, because it "singled out" public housing beneficiaries and "disenfranchised" them by requiring that they, and they alone, convince both a majority of the city council *and* a majority of the electorate before they could garner beneficial legislation. The Court's failure to so hold further reaffirms that *Hunter* outlawed only the imposition of discriminatory burdens on racial minorities; it did not imply that popular referenda are prohibited from controlling the discretion of elected representatives.[10] And although the *James* Court acknowledged that the challenged constitutional amendment

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[10] Of course, *Hunter* itself made perfectly clear that the only constitutional deficiency with the challenged initiative was that it embodied a racial classification. The Court characterized the amendment as "an explicit racial classification," 393 U.S. at 389, and further stated that it was applying strict scrutiny solely because of that classification:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official discrimination based on race, racial classifications are constitutionally suspect, and subject to the most rigid scrutiny. They bear a far heavier burden of justification than other classifications.

Id. at 391-92 (citations and internal quotations omitted).

"hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage," it expressly concluded that this was not a constitutionally cognizable problem:

> But obviously a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

402 U.S. at 142.

One month after *James* was decided, a unanimous Court upheld yet another nonracial popular referendum in *Gordon v. Lance*, 403 U.S. 1 (1971). There, the Court upheld a West Virginia statute requiring super-majority approval in a popular referendum of any proposed increase in bonded indebtedness or state tax rates. Because *Gordon upheld* this super-majority requirement and popular referendum vote, it simply could not, as a technical matter, establish any constitutional rule *restricting* the permissible scope or contours of popular referenda. More important, since *Gordon* was decided one month after *James*, and did not mention *James*, much less distinguish it, it could not, as a rational matter, impose constitutional restrictions on popular referenda that *James* did not impose.

Yet the court below found that *Gordon*, in the course of upholding a nonracial referendum, somehow imposed limits on nonracial referendum that are wholly irreconcilable with *James*; the court interpreted *Gordon* to hold that such measures may not adversely affect "independently identifiable groups." Pet. App. D-21. But *Gordon* did not implicitly overrule *James* or otherwise impose this bizarre

requirement. A basic, threshold requirement for demonstrating that a law creates an impermissible "suspect classification" under the Fourteenth Amendment is to establish that there is, in fact, some class or group affected by the legislation. In the language seized upon by the court below, the *Gordon* opinion was simply making the obvious point that petitioners there had not even met this threshold criterion: they could not point to any "independently identifiable group or category" – much less a racial or suspect group – that was affected. *Gordon*, 403 U.S. at 5.

Thus, while *Gordon* confirms the obvious point that being a member of an "identifiable group" is a *necessary* prerequisite to mounting a *Hunter* claim, it nowhere implies that membership in such a group is *sufficient* to invalidate a referendum affecting that group. To the contrary, *Gordon* affirms that *Hunter* is strictly limited to prohibiting referenda that erect special political boundaries for racial minorities. The Court in *Gordon* expressly recognized that *Hunter* turned on the fact that the law in that case singled out a "discrete and insular minority." 403 U.S. at 5.[11] Because homosexuals are not a racial

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[11] This Court's subsequent decision in *Washington* further confirms that *Hunter*'s condemnation of popular initiatives was limited to those which imposed a racial classification burdening racial minorities. *See, e.g.*, 458 U.S. at 486 ("*Hunter* . . . rested on a principle that has been vital for over a century – that 'the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on *race*.' ") (emphasis added); *id.* at 474 ("Given the *racial* focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.") (emphasis added); *id.* ("As in *Hunter*, then, the community's political mechanisms are modified to place effective decision-making authority over a *racial* issue at a different level of government.") (emphasis added); *id.* at 485 ("[T]he charter amendment at issue in *Hunter* dealt in explicitly *racial* terms with legislation designed to benefit minorities 'as minorities'. . . .") (emphasis added).

group or even a suspect class, they cannot satisfy this threshold requirement for seeking application of *Hunter*.

Amendment 2 is constitutional for an additional reason: homosexuals in Colorado have suffered no political burden remotely analogous to that suffered by the plaintiffs in *James*. Unlike the amendments at issue in *James* and *Hunter*, Amendment 2 does not change the political process at all, and it does not erect a unique political obstacle affecting only one type of legislation. Thus, this is a much easier case than even *James* or *Gordon* because Amendment 2 does not impose any "special burdens on [homosexual] minorities within the governmental process." *Hunter*, 393 U.S. at 391. The cognizable burden on the political process in both *James* and *Hunter* was the "double vote" requirement mandating that the relevant legislation be accepted only if a majority of the City Council *and* a majority of voters agreed. *See Crawford v. Board of Educ.*, 458 U.S. 527, 541 (1982) (discussing the *Hunter* ordinance; "[W]hereas most ordinances regulating real property would take effect once enacted by the City Council, ordinances prohibiting racial discrimination in housing would be forced to clear an additional hurdle."). *Hunter* quite sensibly held that requiring only black citizens to win two votes before garnering favorable legislation was no more constitutional than requiring black citizens alone to take two driving tests before securing a license. It was this direct manipulation of the political and lawmaking process itself that imposed the discriminatory racial burden condemned in that case.

Here, there is simply no such alteration of the political or lawmaking process. As noted, Amendment 2 leaves the political process entirely alone; it simply makes a

substantive decision concerning the appropriateness of certain legislation. The persons who voted against Amendment 2 are in precisely the same position as any other group that has lost a popular initiative election and, if they choose to undo Amendment 2 through a constitutional amendment, will play by precisely the same rules as all others. Thus, unlike *James* and *Gordon*, the political and lawmaking process for gays and their supporters remains entirely neutral. The only harm respondents have suffered is the harm inevitably suffered by any group that loses an electoral battle on substantive policy. *Cf. Hunter*, 393 U.S. at 394 (Harlan, J., concurring) ("If the Council's fair housing legislation were defeated at a referendum, Negroes would undoubtedly lose an important political battle, but they would not thereby be denied equal protection.")

It is true that, in the racial context, this Court in *Washington* held that a popularly enacted state-wide initiative could not unilaterally ban all integrative busing, even though it was constitutionally permissible for some local jurisdictions to voluntarily terminate mandatory racial balancing of their schools. For the reasons already stated, this decision has no application here because, as the Court took great pains to note, the sole constitutional deficiency in the Washington initiative was that it "rests on distinctions based on race." *Washington*, 458 U.S. at 485 (quoting *James*, 402 U.S. at 141).

We nevertheless further note that *Washington* did not lay down some blanket prohibition against state constitutions addressing issues that affect racial minorities or other suspect classifications. Resolution in a state constitution of issues ranging from affirmative action quotas to funding of private religious schools can all be fairly characterized as adversely affecting the "racial and religious groups" protected by *Hunter*. *Hunter*, 393 U.S. at 390. However, if a legislature is constitutionally free, for example, to impose a race-neutral contracting system or

deny state aid to pervasively sectarian institutions, state electorates should be at least as free to make such policy choices directly in the state constitution, regardless of whether the initiatives are opposed by religious or racial minorities.

Washington does not establish a contrary rule, but held only that, in light of Washington's highly unusual scheme of "emphatically . . . vest[ing] in local school boards" *all* control over educational issues, the state-wide busing initiative "worked a major reordering of the State's educational decisionmaking process." 458 U.S. at 478, 479. The *Washington* Court, however, repeatedly eschewed any interpretation of its opinion as more broadly forbidding resolution of sensitive racial issues in state constitutions or as establishing that such state-wide resolution constitutes a forbidden redistribution of political power. To the contrary, the Court emphasized that the states continue to be "accorded the widest latitude in ordering their internal governmental processes," and that its opinion created no "vested constitutional right to local decisionmaking." *Id.* at 476, 480 n.23 (quoting *id.* at 498-99 (Powell, J., dissenting)). More specifically, the opinion dismissed the dissent's accusation that the state may not intervene if "local employment or benefits are distributed on a racial basis to the benefit of racial minorities" as a "parade of horribles" "entirely unrelated to this case." *Id.* at 480 n.23; 498 n.14 (Powell, J., dissenting).

Equally important, on the same day it decided *Washington*, the Court, in *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), upheld a state constitutional amendment limiting court-ordered integrative busing, thus establishing that the electorate is free to address racial issues in state constitutions even over the objections of certain minority interests. As the Court noted, substantive policy decisions on racial issues, such as the anti-busing initiative in *Crawford*, do not "distort[ ] the political process for racial

reasons or . . . allocate[ ] governmental or judicial power on the basis of a discriminatory principle." *Id.* at 541.

Accordingly, in addition to reaffirming that *Hunter* and *Washington* are limited to invidious racial classifications, the Court should confirm that popular referenda and state constitutional amendments may embody policy decisions that are compatible with the Constitution's substantive requirements, even if the Amendment deals with an issue of particular concern to racial minorities. Absent the unique circumstances present in *Washington*, popular referenda that do not address the electoral or lawmaking process "work[ ] a simple change in policy rather than a forbidden reallocation of power." *Washington*, 458 U.S. at 476. Thus, even assuming *Hunter*'s prohibition against additional burdens in the lawmaking process extended to nonracial groups, Amendment 2 is nonetheless constitutional because that straightforward policy determination does not alter or deny anyone access to the political or lawmaking process.

We note finally that even if the Court decides to substantially extend *Washington* to invalidate constitutional amendments of the sort at issue here, it should clarify that this prohibition cannot extend to popular referenda enacted by voters in *local* communities. Even in the unique situation presented in *Washington*, the only potential effect on the political process was that it transferred local "decisionmaking authority over the question [to] a new and remote level of government." *Washington*, 458 U.S. at 483. In contrast, where local referenda decide questions for the relevant political jurisdiction, local decisionmaking remains at a local level. The only change is that the citizenry, rather than the elected officials, make the challenged decision. As noted, nothing in *Washington* or any other case even hints that such popular decisionmaking is unconstitutional, and any such conclusion would be flatly irreconcilable with this nation's political

tradition of town hall meetings and constitutional tradition of a limited government with delegated powers.

In sum, Amendment 2 does not infringe any fundamental right and hence is constitutional because it so plainly advances a rational government interest.[12]

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[12] Since it is abundantly clear that Amendment 2 has a rational basis, the Court should simply lift the injunction without a further remand to the Colorado Supreme Court. Indeed, that court itself held in *Evans II* that Amendment 2 serves the compelling (and therefore necessarily legitimate) governmental interests of protecting religious liberty and associational privacy. Pet. App. B-8, 13. The court held, however, that Amendment 2 is not narrowly tailored to serve those interests, a consideration that is irrelevant under rational basis review. Civil rights laws protecting homosexuals necessarily deny employers and landlords their traditional freedom to associate with whomever they please and to attach significance to a sexual behavior or lifestyle that they may believe is inappropriate or sinful. By prohibiting such government coercion, Amendment 2 thus preserves the citizenry's traditional freedom to associate and to act on sincerely-held religious or moral beliefs concerning the propriety of certain behavior. While enhancing freedom is always rational, it serves a particularly compelling interest in the context presented here. Eliminating the liberty of landlords and employers to take account of homosexuality sends the unmistakable message that homosexual behavior, like race, is a characteristic which only an irrational bigot would consider. By restoring government neutrality on this difficult and divisive moral issue, Amendment 2 promotes freedom and diversity by allowing different groups in the community to hold, and act on, different views on this question.

CONCLUSION

For the foregoing reasons, the rulings of the Colorado Supreme Court in *Evans I* and *Evans II* should be reversed, and this matter should be remanded to that Court with instructions to enter judgment for petitioners.

Respectfully submitted,

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